IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS; INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Plaintiffs and Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Defendants and Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Intervenors and Appellees/
Cross-Appellants.

APPELLANTS' COMBINED REPLY AND ANSWER TO CROSS-APPEAL BRIEF, REPLY TO APPELLEE BRIEF, AND RESPONSE TO INTERVENORS'/APPELLEES' MOTION TO DISMISS APPEAL ON GROUNDS OF MOOTNESS

APPEARANCES:

Roger Sullivan
John F. Lacey
McGarvey, Heberling, Sullivan
& McGarvey, P.C.
745 South Main
Kalispell MT 59901
Ph: 406-752-5566
Fax: 406-752-7124
Email: rsullivan@mcgarveylaw.com

Elizabeth A. Best
Best Law Offices, P.C.
425 3rd Avenue North
P O Box 2114
Great Falls MT 59403
Ph: 406-452-2933
Fax: 406-452-9920
Email: beth@bestlawoffices.net
Attorneys for Plaintiffs/Appellants

Alan F. McCormick
Garlington, Lohn & Robinson, PLLP
P O Box 7909
Missoula MT 59807-7909
Ph: 406-523-2500
Fax: 406-523-2595
Email: afmccormick@garlington.com

Brian Hopkins
Cascade Deputy County Attorney
121 - 4th Street North
Great Falls MT 59401
Ph: 406-454-6915
Fax: 406-454-6949
Email: bhopkins@co.cascade.mt.us
Attorneys for Defendants/Appellees

Gary M. Zadick
Mary K. Jaraczeski
Ugrin, Alexander, Zadick & Higgins, PC
P O Box 1746
Great Falls MT 59403-1746
Ph: 406-771-0007
Fax: 406-452-9360
Email: gmz@uazh.com
Email: mkj@uazh.com
Attorneys for Intervenors and
Appellees/Cross-Appellants SME/Urquharts

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

The Appellants (collectively Plains Grains) respond to the issues raised in the cross-appeal of Southern Montana Electric (SME), and reply to SME and the Board of Commissioners of Cascade County (Commissioners) in support of the issues raised in Plains Grains' underlying appeal. In addition, SME has filed a Motion to Dismiss Appeal on Grounds of Mootness. SME has raised this same issue in its brief in support of its cross-appeal, and Plains Grains responds to the issue of mootness in this consolidated brief. Plains Grains addresses the threshold issue of mootness first.

II. ARGUMENT

A. Plains Grains' Appeal Has Not Been Rendered Moot.

1. What this lawsuit is about: Montana citizens challenging the legality of a legislative act of their local governing body.

Plains Grains includes farmers and ranchers who own land contiguous to 668 acres of land which the Commissioners rezoned from Agricultural to Heavy Industrial. Within 30 days thereafter Plains Grains filed suit against the Commissioners, exercising their rights as Montana citizens to challenge the legality of the legislative enactment of their local governing body. This Court has made clear that both zoning and rezoning are legislative acts. *Schanz v. City of Billings* (1979), 182 Mont. 328, 335, 597 P.2d 67, 71; *North 93 Neighbors v. Bd. of County Commissioners of Flathead County*, 2006 MT 132, ¶ 18, 332 Mont. 327, 137 P.3d

557. "A legislative act is an action by a legislative body which results in creation of law or declaration of public policy." *Kiely Const., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 84, 312 Mont. 52, 57 P.3d 836 (noting that, in contrast, the approval of a specific subdivision is an administrative act). Thus, in this lawsuit, Montanans who make their living from the land have exercised their rights to petition their government for the redress of the grievance of their local legislative body enacting illegal legislation.

SME, which proposed to build a coal-fired electrical generation complex on the rezoned land voluntarily intervened in this lawsuit against the Commissioners. It seeks now to curtail the citizens' challenge to the legality of the legislation at issue by contending that Plains Grains is required to obtain a stay and post a bond, the absence of which, SME argues, renders this case moot. The District Court rejected the same arguments below. It recognized as a red herring SME's argument that the closing of a land transaction between SME and the Urquharts rendered the citizens' suit moot. It found that SME had actually entered into the agreement to purchase the Urquharts' land years before the rezoning and subsequent closing of the transaction, and that "both SME and the Urquharts jointly participated in pursuing approval of the Application to rezone the land." (Order, p. 3, FOF #2, #3; Appendix Tab A.)

The District Court properly noted that mootness is "founded on the impossibility of the Court granting effective relief or returning the parties to the status quo." (*Id.* at p. 11.) In this case, "The underlying status quo is not property ownership but the re-zoning determination by the Cascade County Commissioners. That is not moot for either Defendant SME or any of the Plaintiffs." (*Id.*)[1] Thus, the District Court recognized that it could still grant effective relief (*i.e.*, declaring void the challenged rezoning). Finally, the District Court noted that:

> A stay would require a bond that would cover the prospective damages to Defendants due to delayed construction. Both parties acknowledge such a bond could be astronomical, depending on this Court's assessment. Plaintiffs plainly and simply argue that as citizens, they have a right to access the courts for remedies and not have to assume such astronomical costs as a prerequisite to that right. . . . This Court agrees primarily because the rights afforded under Article II, Section 16 are worthless if they become dependent upon large expenditures of money.

(Order, pp. 11-12; Tab A.)

As set forth below, based on the facts of this case and applicable legal standards, the District Court's ruling, from which SME now appeals, is correct.

//

//

//

---

[1]All emphasis herein is added.

2. The District Court's determination that this case is not moot is supported by the facts and the law.

a. The party claiming mootness bears a heavy burden.

"A party seeking to establish that an issue raised on appeal is moot has a heavy burden." *Clark v. Dussault* (1994), 265 Mont. 479, 484-85, 828 P.2d 239, 242; *Butte-Silver Bow Local Gov't. v. Olsen* (1987), 228 Mont. 77, 82, 743 P.2d 564, 567. Simply stated, SME has not met its heavy burden in proving, either below or on appeal, that Plains Grains' challenge of the legislation at issue is moot.[2]

b. A case is moot only when a court can neither grant effective relief nor restore the status quo.

The treatises instruct that:

> The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief. A wise answer to this question is always bound by the facts of the specific case. . . . [C]ourts must be careful to appraise the full range of remedial opportunities.

13A Fed.Prac. & Proc. 2d § 3533.3, "Mootness," Wright, Miller, Cooper.

The Montana Supreme Court applies essentially the same standard in determining whether a question is moot:

A question is moot when, due to an event or happening, the disputed

---

[2]Plains Grains notes that, with the filing of this brief, Plains Grains has no further right to respond. As such, any belated attempt by SME to cure its failure to meet its "heavy burden" must be rejected by the Court.

> question has ceased to exist and no longer presents an actual controversy. In other words, a matter is moot when a court cannot grant effective relief or restore the parties to their original position.

In re Marriage of Gorton, 2008 MT 123, ¶ 16, 342 Mont. 537, 182 P.3d 746 (citation omitted). *See also Skinner v. Lewis and Clark*, 1999 MT 106, ¶ 13, 294 Mont. 310, 980 P.2d 1049 ("A question becomes moot on appeal 'where by a change of circumstances prior to the appellate decision the case has lost any practical purpose for the parties, for instance where the grievance that gave rise to the case has been eliminated.'") *quoting Van Troba v. Montana State Univ.*, 1998 MT 292, ¶ 35, 291 Mont. 522, 970 P.2d 1029.

Here, the actual controversy remains. Appellants have alleged and clearly demonstrated in this proceeding that the legislative act of rezoning at issue is illegal, that it should be declared *void ab initio*, and that there is no impediment to the Court granting "effective relief." As noted by the District Court, that relief involves "not property ownership but the rezoning determination by the Cascade County Commissioners." (Order, p. 11; Tab A.)

SME cannot unilaterally obviate the actual controversy regarding the Commissioners' wrongful rezoning of the land at issue. On the contrary, SME's decision to close the already agreed to land transaction after its rezoning had been contested in District Court, and then to commence construction in the midst of the

challenge to the Commissioners' decision, was at its own risk. *See, e.g., Doull v. Wohlschlager* (1963), 141 Mont. 354, 368, 377 P.2d 758, 765 (defendant could not "take advantage of his own wrongs" and avoid zoning laws by deliberately proceeding during appeal with construction in hopes of presenting "a *fait accompli*" to the court). SME's voluntary intervention in the case, prior to its closing, highlights the actual controversy involving the rezoning determination. Any notion that it can now overcome the Commissioners' unlawful decision and be rewarded under the veil of mootness by closing on a land purchase (which has never been the focus of litigation) in spite of that ongoing controversy is absurd. *See Montana Wilderness Ass'n v. Fry* (D.Mont. 2004), 310 F.Supp. 1127, 1141-42 (characterizing construction efforts during litigation as an attempt to "hide behind the mootness doctrine" which "'gotcha' arguments [are] of no avail here.").

c. SME's argument is undermined by the facts of this case.

SME's reliance on cases involving the transfer of property ownership to third parties during the pendency of the litigation are inapposite. *See Henesh v. Bd. of Comm'rs of Gallatin County*, 2007 MT 335, 340 Mont. 249, 173 P.3d. 1188; *Mills v. Alta Vista Ranch, LLC*, 2008 MT 214, 344 Mont. 212, 187 P.3d 627.

SME argues that this case is moot because "the real property was sold by the

Urquhart family to Southern Montana on August 25, 2008, during the pendency of Plains Grains' appeal to the District Court, and the deeds were recorded August 26, 2008." (SME's Motion to Dismiss at p. 4.) SME further argues that Plains Grains' appeal should be declared moot because "Plains Grains never moved for a stay despite knowing that the property was to be sold and there was a deadline to commence construction under the DEQ air permit." (SME's Brief at p. 25.)

The District Court found the following undisputed facts prior to ruling that this case was not moot:

> 2. Throughout the course of the rezoning proceedings, which culminated in the Commissioners' rezoning the 668.395 acres of farmland from Agricultural (A-2) to Heavy Industrial (I-2), both SME and the Urquharts jointly participated in pursuing approval of the Application to rezone the land. In fact, the Application for Rezoning was prepared by Bison Engineering, SME's engineering firm, and Ugrin, Alexander, Zadick & Higgins, P.C., the law firm which jointly represents SME and the Urquharts. (*Id.*) [Application for Rezoning, Tab C Appendix.] The majority of the materials submitted with the Application for Rezoning consisted of materials describing the Highwood Generating Station, the coal fired power plant which SME plans to construct on the rezoned land. (*Id.*)
>
> * * *
>
> 3. Prior to the Commissioners' approval of Urquharts' request to rezone the land from agricultural to heavy industrial, the Urquharts had already agreed to sell the property to SME. The "Option to Purchase" agreements entered into between SME and the Urquharts in 2004 recite: "The Seller and Buyer acknowledge that Buyer is engaged in acquisition of the property upon which it intends to construct electric generating facilities." (Exhibit 21) [Attached hereto as Appendix Tab G(21).] The purpose of SME entering into these agreements was so that it could

demonstrate to finance and regulatory agencies that it had a property interest in the subject property. (See Exhibit 21, ¶ 2.)

(Order, pp. 3-4; Tab A; brackets added.)

Thus, SME was not a "third party" such as the Court sought to protect in *Henesh* and *Mills*. It was actively involved in the rezoning legislation now challenged.[3] Accordingly, this case is not moot, as the Court could still grant effective relief by declaring void the challenged legislation (not the transfer of the property agreed to years before the legislation was passed).

SME also contends that its "commencement of construction" rendered the case moot. Again, SME advances a red herring. SME "commenced construction" in the form of earthmoving and site preparation for its coal-fired power plant. However, SME lacked financing for construction of the coal-fired facility (Tab G, ¶¶ 19, 29), commenced construction unlawfully (Tab Q), ceased construction voluntarily because it did not have the financial resources to proceed, and lost its air permit to proceed

---

[3]In a January 9, 2008, letter from SME to the County Planning Department (Tab G(7)), SME requested "as a condition of rezoning to heavy industrial use" 11 conditions, all of which explicitly applied only to SME. (Tab K, p. 3.) SME's letter requesting conditional zoning was not signed by the Urquharts, nor did it even indicate that it was being submitted on behalf of the Urquharts. The Commissioners passed the motion rezoning the farmland from Agricultural to Heavy Industrial "subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric representing the Applicants . . ." (*Id.*, p. 6.)

with construction of the coal-fired electrical generation facility (Tab S). Inevitably, despite SME's unlawful rush to "commence construction," work on SME's coal-fired power plant came to a halt.

SME now seeks to proceed with a different natural gas powered electrical generation project. To date, SME still does not have a required final air permit to proceed with construction of its proposed natural gas powered project. What remains clear is that there is great "practical purpose" for these parties, as the controversy regarding the validity of the rezoning that gave rise to this case has not been eliminated. *Van Troba*, ¶ 35.

In September 2008, SME's General Manager acknowledged that the HGS project faced "significant challenges." Among the significant challenges, SME had not obtained financing to construct HGS. The estimated cost of the coal-fired generating plant was between $800 and $850 million, and construction would take 52 to 55 months. (Tab G, ¶ 29.) In 2004, SME applied to the federal Rural Utility Service (RUS) for a loan guaranty to construct and operate the 215-250 mW coal fired power plant. The loan guarantee from RUS that SME was relying on to construct its $800 million facility was never received. (Tab G, ¶ 19; see also Tab G(21), attached.)

The Yellowstone Valley Electric Cooperative, Inc. (YVEC) was the largest of

the five generation and transmission cooperatives that made up SME. However, because of its concerns over enormously increased estimates of the cost of the project and financing, YVEC expressed fear that the power generated from HGS would be cost prohibitive. YVEC was then "excluded" from the re-organized SME. (Tab G(22), attached; see also Tab G, ¶ 21.) In addition, the City of Great Falls, a member of SME, stated in June 2008, that because of financing and legislative developments, the Electric City Power Board needed to critically reexamine its involvement in the project, "to determine its ownership participation and at what level, all, some or none." (Tab G(23), attached; see also Tab G, ¶ 22.)

As SME has noted, "there was a deadline to commence construction under the DEQ Air Permit." (SME's Brief at p. 25.) On October 15, 2008, heavy equipment began moving dirt and trenching at the site of the HGS coal-fired power plant.[4] However, SME did not have a valid air permit from DEQ at the time that it "commenced construction." Thus, on November 20, 2008, DEQ issued a Notice of Violation to SME on the basis that SME had commenced construction without the

[4]On October 16 Appellants filed another motion requesting immediate action by the District Court. See Plaintiffs' "Brief in Support of Request for Immediate Issuance of Writs and Reply to Defendant's Opposition to Motion for Expedited Hearing," dated October 16, 2008.

required air permit from DEQ for SME's coal-fired power plant (Tab Q, attached).[5] Eventually, on August 3, 2009, DEQ received from SME a request that its air quality permit to operate HGS as a coal-fired power plant be revoked, on the basis that SME was now planning to build a much smaller natural gas-powered facility at HGS. (Tab R, attached.) DEQ revoked SME's permit for the coal-fired power plant that SME represented to the Commissioners would be built, and as of the submission of this brief, SME has still not received a final permit from DEQ to operate its now proposed gas-fired power plant. (Tab S, attached.) However, unlike the 668 acre industrial complex contemplated for the coal-fired electrical generating station (which included wind turbines, rail lines, and ash disposal components, all of which have been eliminated) according to SME in regards to the acreage needed for the natural gas plant: "The total footprint of the Project will be approximately six acres." (Tab T, attached.)

d. SME's citations to authority do not support its argument.

As recognized by this Court:

Since meaningful relief is determined by a particular set of facts, a

---

[5]DEQ's regulations required that SME "commenced construction" by November 30, 2008, or the air permit for the coal-fired power plant would expire. See Tab G at ¶ 24. (In the photocopying process the even-numbered pages of Tab G were inadvertently omitted. Therefore Tab G is resubmitted in its entirety.)

finding of mootness can only occur on a case-by-case basis.

Awareness Group v. Board of Trustees of Sch. Dist. No. 4 (1990), 243 Mont. 469, 475, 795 P.2d 447, 451. A review of the cases relied on by SME reveals that they are all distinguishable.

i. SME's reliance on *Turner* is misplaced.

The first case relied upon by SME in support of its mootness argument is *Turner v. Milton Engr. and Constr., Inc.* (1996), 276 Mont. 55, 915 P.2d 799. (SME's Brief at pp. 19-20.) *Turner's* "particular set of facts" carry no weight here. In *Turner*, a mortgagee sued to foreclose on its mortgages and to determine the priority of its mortgage liens over asserted construction liens. The District Court ruled in favor of the mortgagee and entered a judgment on the foreclosure. The construction lienholder did not obtain a stay. Absent a stay pending appeal, the property was then sold at a sheriff's sale, from which no surplus was available to satisfy the claimed construction liens. This Court held on appeal that the construction lienholder's appeal had become moot, since without a surplus following the sheriff's sale from which to satisfy the construction lienholder's claims, there was no effective relief which the Court could grant. In reaching this result, the *Turner* Court relied on the oft-stated standard that, "In deciding whether a case is moot, we determine whether this Court can fashion effective relief." *Turner*, 276 Mont. at 61, 915 P.2d at 803.

In contrast, the relief sought in this case by Plains Grains is to have the Court declare void the legislative act of rezoning the land from Agricultural to Heavy Industrial. This Court can certainly grant effective relief by declaring the legislative act void. Unlike *Turner*, there are no competing remedies sought by way of claims advanced by other parties to the litigation, and there is no need to seek a stay since SME has yet to obtain all required permits, or obtain financing, for the multi-million dollar project. While construction previously commenced (unlawfully) on the coal-fired power plant, construction remains suspended. In fact, SME's permit for its coal-fired power plant has been revoked. (Tab S.) At present, SME continues to await issuance of a final permit to construct a natural gas powered generating station. An actual controversy regarding the rezoning remains.

ii. The subdivision cases relied upon by SME are distinguishable.

In *Henesh v. Board of Comm'rs of Gallatin County*, 2007 MT 335, 340 Mont. 249, 173 P.3d, 1188, the plaintiff challenged the County Commissioners' approval of a preliminary plat for a subdivision. The District Court granted summary judgment to the Commissioners, and the plaintiff did not apply for a stay of the judgment. The developer subsequently obtained final plat approval and sold the lots in the subdivision to a third party; *i.e.*, not a party to the lawsuit. *Id.*, ¶ 4. In dismissing the

appeal as moot, this Court noted that it could no longer grant effective relief or return the parties to the status quo "because of the transfer of the lots in the subdivision to a third party." *Id.*, at ¶ 6 (citing *Turner, supra.*).

The same result was reached in *Mills v. Alta Vista Ranch, LLC.*, 2008 MT 214, 344 Mont. 212, 187 P.3d 627. There, the County Clerk and Recorder sought a declaration that Certificates of Survey which created parcels were illegal divisions of land under the Subdivision and Platting Act. The District Court granted summary judgment to the intervening landowners. The Clerk and Recorder appealed, but did not seek a stay. While this Court agreed with the Clerk and Recorder and was able to grant relief in regards to several of the Certificates of Survey, it dismissed as moot the appeal as regards the parcel owned by one landowner, because that landowner had already sold the reaggregated parcel to a third party, explaining once again, in reliance on the specific facts of the case, that "Under these circumstances, it is impossible for this Court to grant effective relief or return the parties to the status quo." *Id.* at ¶ 22.

Unlike *Henesh* and *Mills*, here no third party is involved. SME and the Urquharts intervened in this lawsuit and became parties. Likewise, the District Court noted that both SME and the Urquharts specifically applied to Cascade County for rezoning provisions, which rezoning is the single focus of this lawsuit. (Order, p. 3;

Tab A.) Moreover, the District Court found:

> Prior to the Commissioners' approval of Urquharts' request to rezone the land from agricultural to heavy industrial, the Urquharts had already agreed to sell the property to SME.

(*Id.* at p. 4; Tab A.)

SME is attempting to distort *Henesh* and *Mills* to reach the incongruous result that a developer and landowner could manipulate the dismissal of a preliminary plat challenge on the basis of the landowner selling the land to the developer after preliminary plat approval. Those cases do not stand for that absurd proposition. The focus of the Supreme Court's concern in *Henesh* and *Mills* was that, after obtaining final plat approval and/or recordation of the COS's, the subject parcels had been sold to third parties, thereby eliminating the Court's ability to grant to the parties before it the relief sought; *i.e.*, the voiding of the preliminary plat or COS.

Likewise, the case of *Swan Lakers v. Bd. of County Comm'rs of Lake County*, Mont. Sup. Ct. Cause No. DA 07-0619, is clearly distinguishable. In *Swan Lakers*, another case challenging a preliminary plat approval of a subdivision, the plaintiffs had already obtained a stay, and this Court simply remanded the case to district court for the determination of an appropriate bond. *Id,*, slip opinion at p. 3. Here, no stay was obtained, or needed to be obtained.

Finally, this Court has noted that there is a fundamental distinction between the

administrative act of approving a subdivision and the legislative act of zoning and rezoning. *Kiely Const.*, ¶¶ 80-85; *Schanz*, 182 Mont. at 335, 597 P.2d at 71. "A legislative act is an action by a legislative body which results in creation of law or declaration of public policy." *Kiely Const.*, ¶ 84. This distinction is inherent in the District Courts' consideration of the cases relied upon by SME:

> These holdings were founded on the impossibility of the Court's granting effective relief or returning the parties to the status quo. *Id.*, *Henesh* at ¶ 5-6. Defendants construe this to mean that Plaintiffs' failure to obtain a stay precludes a return to status quo due to the sale of the property to SME. Defendants' Memo in Support, August 27, 2008, p. 11. However, the question is to which status quo are the Defendants referring? The underlying status quo is not property ownership but the re-zoning determination by the Cascade County Commissioners. That is not moot for either Defendant SME or any of the Plaintiffs.

(Order at p. 11; Tab A.)

As regards the Urquharts, the Court went on to note that, "Now that the Urquharts no longer own the property, it is arguable that the re-zoning decision is moot for them, e.g., what interests remain that require return to status quo? The Court certainly has not been presented with any legal arguments that the land sale should be overturned." (*Id.* at p. 11.) Indeed, Plains Grains never sought to overturn the land sale, which sale was agreed to long before the rezoning at issue. Rather, as noted by the District Court, the adjoining farmers and ranchers challenged the legislative act of the Commissioners in rezoning the 668 acres of land from

Agricultural to Heavy Industrial. Thus, the cases cited by SME do not apply to this legislative challenge.

iii. The actual controversy in this case remains, and meaningful relief can be granted.

The coal-fired power plant which SME intended for the 668 acres that was rezoned by the Commissioners has not been built. SME was unable to obtain the financing necessary to construct the coal-fired power plant. On August 20, 2009, DEQ revoked SME's air permit. SME now awaits issuance of a final air permit from DEQ in order to commence construction of its proposed natural gas powered electrical generation facility, which according to SME will cover only six acres of the 668 acres that was rezoned.

These facts stand in stark contrast to the facts in *Povsha v. City of Billings,* 2007 MT 353, 340 Mont. 346, 174 P.3d 515. In *Povsha*, the plaintiff filed his complaint in May 2002, seeking to enjoin and set aside a zone change and corresponding subdivision approval intended to allow construction of an auto auction and body shop. *Id.*, ¶¶ 10, 11. Following a June 2002 hearing, the District Court denied the plaintiff's application. No appeal occurred. Thereafter, the City issued the applicant a building permit and construction was completed in the fall of 2002. *Id.*, at ¶12. Meanwhile, the litigation continued until July 2005, when the District Court

granted the City's Motion for Summary Judgment. The plaintiff then appealed the District Court's decision. The Supreme Court determined that it was no longer able to grant the plaintiff effective relief and that the dispute was moot, noting that the plaintiff failed to seek a stay, and that the disputed subdivision approval and zone change were granted, and the structure built, "long ago." *Id.*, ¶¶ 22-24.

Povsha is clearly distinguishable. It hinges on entirely different facts. The ruling in *Povsha* was based on the completion of the facility years before the case reached the Court. Based on this *fait accompli*, the *Povsha* Court ruled the case moot. Here, construction of SME's 668 acre industrial complex for its coal-fired power plant will never be completed.[6] Mootness is neither a factually nor legally justified basis to preserve the illegal zone change in this case.

3. The District Court properly reconciled a possible conflict between statutory law and constitutional provisions.

The District Court carefully reviewed the particular facts and circumstances of this case to determine that effective relief could still be granted and that the case is not moot. Its reasoning, supported by the facts and law above, is correct and should be affirmed.

---

[6]It also bears noting that the farmers and ranchers who initiated this challenge to a legislative act of their local governing body have made every effort below, and now on appeal, to have the Courts expedite the determination of this matter.

The District Court recognized in its analysis that the farmers and ranchers who brought this suit are simply Montana citizens exercising their fundamental right of access to the courts to petition for the redress of a grievance - - an illegal legislative act passed by their local governing body. Thus, the District Court also determined that SME's attempt to force Plains Grains to obtain a stay and post a bond would undermine their fundamental right of access to the courts:

> A stay would require a bond that would cover the prospective damages to Defendants due to delayed construction. Both parties acknowledge such a bond could be astronomical, depending on this Court's assessment. Plaintiffs plainly and simply argue that as citizens, they have a right to access the courts for remedies and not have to assume such astronomical costs as a prerequisite to that right. . . . This Court agrees primarily because the rights afforded under Article II Section 16 are worthless if they become dependent upon large expenditures of money.

(Order at pp. 11-12; Tab A.)

On appeal, SME argues that the District Court erred when so ruling. (SME's Brief at p. 26.) However, the District Court's ruling is solidly predicated on well-recognized principles of Montana law. The District Court properly reconciled a possible conflict between statutory law and constitutional provisions. *See, e.g., State ex rel. Nelson v. District Court* (1993), 262 Mont. 70, 79, 863 P.2d 1027, 1032 (overruled on other grounds), citing 16 Am.Jur.2d (1979) Constitutional Law § 222.

SME's effort to force the citizens challenging the legislation to obtain a stay and thereby face the prospect of injunction damages is analogous to the efforts of intervenors in other citizen suits against government entities, wherein intervenors have attempted to state damage claims against the citizens for interfering with their business interests. Dubbed "SLAPP suits" (Strategic Lawsuits Against Public Participation), courts have uniformly rejected such suits on the basis that they would vitiate the citizen's right to petition the government for the redress of grievances, as guaranteed by the U.S. (and Montana) Constitution. *See* U.S.Const., Amend. I; and Mont.Const. Art. II, § 6. Thus, in the seminal case of *Sierra Club v. Butz*, 349 F.Supp. 934, 936 (N.D.Cal.1972), the federal court rejected such a suit, explaining:

> The basis of the defense is, of course, the First Amendment provision guaranteeing the right of the people to petition the government for a redress of grievances. As the Supreme Court noted in *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945), this is a basic freedom in a participatory government, closely related to freedom of speech and press; together these are the "indispensable democratic freedoms" that cannot be abridged if a government is to continue to reflect the desires of the people. Thus, this court cannot be too careful in assuring that its acts do not infringe this right.

Likewise, in *Protect Our Mountain Environment, Inc. (POME) v. District Court* (Colo.1984), 677 P.2d 1361, 1365, the Colorado Supreme Court noted:

> Were it otherwise, the right to petition would have little significance in the constitutional scheme of things. Access to the court is often the only method by which a person or a group of citizens may seek vindication

> of federal and state rights and ensure accountability in the affairs of government. For this reason collective activity undertaken to obtain meaningful access to the courts has been recognized as "a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585, 91 S.Ct. 1076, 1082, 28 L.Ed.2d 339, 347 (1971).

POME, 677 P.2d at 1365 (footnote omitted).[7]

As *Sierra Club*, *POME*, and other such cases make clear, the filing of citizen suits against government entities is a protected activity under the "right to petition" provisions of the First Amendment to the U.S. Constitution (and equally here Art. II, § 6 of the Montana Constitution). Only where the plaintiff's petitioning of the court is a "sham" (*i.e.*, no basis in law or fact) can the protection afforded by the First Amendment (and Montana Constitution) be overcome. This is known as the Noerr-Penington Doctrine.[8]

Here, in addition to the protected right to petition recognized in the above-stated cases, Montana citizens have an explicit and fundamental constitutional right

---

[7]The *POME* Court footnoted state constitution provisions similar to the federal constitution, in particular the Colorado state constitution's access clause, right to petition clause, and judicial article, all similarly contained in Montana's Constitution. *See* Mont.Const. Art. II, § 16; Art. II, § 6; and Art. VII.

[8]This doctrine derives from two U.S. Supreme Court opinions disallowing suits against litigants who sought relief through government action, subject to the above-noted sham exception. *See Eastern R.R. Presidents' Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 81 S.Ct. 523 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

of access to the courts, which as noted by the District Court would also be vitiated by SME's attempt to force Appellants to obtain a stay which "would require a bond that would cover the perspective damages to defendants due to delayed construction." (Order, p. 11; Appendix Tab A.) As noted by Justice Nelson in his concurring opinion (which majority concurrence was joined by Justices Cotter, Leaphart and Trieweiler) in *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶¶ 57-58, 310 Mont. 123, 54 P.3d 1:

> Article II, Section 16 of Montana's Constitution guarantees that "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." In my view, this right is as much a fundamental right as is any other Article II right. This is so not only because the right of access to the courts is included within the Constitution's Declaration of Rights, but also, and just as importantly, without the right of access to the courts, other Article II rights would have little protection from infringement and, thus, little meaning. *See Butte Community Union*, 219 Mont. at 430, 712 P.2d at 1311-13; *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172.

Appellants also seek to vindicate their fundamental right to participate in the decision-making process of their local governing body, guaranteed by Article II, § 8 of the Montana Constitution, and implemented in the Montana Public Participation Act, §§ 2-3-101, *et seq.*, MCA, through access to the courts.

Here, Appellants filed suit against the Commissioners to protect the fundamental right guaranteed by Article II, § 8 of the Montana Constitution. SME

(an intervenor) attempts to vitiate that right by contending that Appellants can only pursue their fundamental right of public participation if they obtain a stay which would expose them to "the perspective damages to defendants due to delayed construction." (Order, p. 11; Appendix Tab A.) Simply stated, these farmers and ranchers and other ordinary Montana citizens neither can nor should have to face the prospect of injunction damages due to delayed construction, or the posting of a bond, in order to enter the hallowed halls of Montana's Courts in their effort to enforce their fundamental rights.

At this juncture it is important to recall that the party seeking to have an appeal declared moot "has a heavy burden." *Clark, supra.* But by seeking "state action" through the aegis of the injunction statutes, this "heavy burden" becomes especially onerous where, as here, the fundamental rights of the Appellants are implicated. As such, there is the further requirement that there be a demonstration that the proposed infringement passes muster under the highest level of scrutiny, "The most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right ..." *Kloss*, ¶ 2 (citations omitted).

Thus, there must be a demonstration that SME's ill-fated attempt to have the Court employ the injunction statutes to force Plains Grains into obtaining a stay and posting a bond passes "strict scrutiny." This requires: 1) a compelling state interest

for the requested action; 2) that the action is closely tailored to effectuate only that compelling state interest; and 3) that the choice of action is the least onerous path that can be taken to achieve the objective. *Montana Environmental Information Center v. Dept. of Envt'l Quality,* 1999 MT 248, ¶ 61, 296 Mont. 207, 988 P.2d 1236; *Wadsworth v. State of Montana* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174.

In sum, SME has entirely failed to carry its "heavy burden" in proving that this appeal is moot. Moreover, there has been no demonstration that SME's proposed use of the injunction statutes against Plains Grains to obtain a stay and post a bond passes strict scrutiny. This case remains justiciable and the Court should properly rule on the merits of Plains Grains' appeal.

B. The Rezoning From Agricultural to Heavy Industrial Constituted Spot Zoning.

1. The District Court erred in its analysis of spot zoning.

Little v. Bd. of County Comm'rs of Flathead County (1981), 193 Mont. 334, 631 P.2d 1282, sets forth the applicable three-part test for analyzing spot zoning. Applying *Little*, the District Court found "compelling" bases in favor of Plains Grains. Regarding the first factor, whether the requested use is significantly different from the prevailing use in the area, the District Court noted that, "Unquestionably, there is a change of use," and "the coal fired plant will be a different use than

agricultural." (Order at pp. 24, 25; Tab A.) In consideration of the second factor, size of the rezoned area in relation to the total zoning district area, the District Court determined:

> On the surface, Plaintiffs appear to have a compelling argument. The proposed rezone area would comprise "less than .05% of the total Zoning District area, Writ, p. 31, ¶ 75, and it looks to benefit only one landowner which is now SME. *See Greater Yellowstone Coalition v. Bd. of Co. Commiss. of Gallatin Co.*, 2001 MT 99, 305 Mont. 232, 25 P.3d 168.

(Order at p. 25; Tab A.)

As regards the third factor, whether the zoning request is in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public, the District Court determined:

> A truly substantive argument of the Plaintiffs is that one landowner (be it viewed as either SME, the current deed holder, or the Urquharts, the applicants) will benefit at the expense of others. That expense is not merely the location of a power plant in the "Back 40" but the power lines, rail spurs, and other industrial detritus of a large, power generating facility. As noted at hearing, these accessory impacts will be imposed on some landowners by way of eminent domain. Writ, p. 12, ¶ 21. To that extent, this aspect of the *Little* test distinctly favors Plaintiffs' position.
>
> As noted, the Court concludes this last aspect of the *Little* test indicates special legislation, thus spot zoning.

(*Id.*, pp. 25, 26, Tab A.) SME cross-appeals from the Court's conclusion that the rezoning was special legislation. (SME's Brief at p. 4.)

However, despite the District Court's determinations as to each element of the *Little* test, the District Court determined that the rezoning was not spot zoning on the singular basis that, under a special use provision of the A-2 District, the coal-fired power plant proposed by SME for the site was "already permissible in that agricultural area prior to the rezoning request." (*Id.*, p. 25.) Thus, the District Court concluded that, "this zoning 'change' was not required for the intended uses." (*Id.*)

The District Court's conclusion is fundamentally flawed. The Cascade County Zoning Regulations themselves unequivocally undermine the District Court's ultimate conclusion. Those regulations define "Industrial Uses" as, "Uses of land which are allowed by right **or through the special permit process only in the I-1 or I-2 zoning classifications,** as listed in these regulations." (CCZR § 2.99.31; Tab I.) Even under a special use permit process, an "Industrial Use" can only occur in an I-1 or I-2 zoning classification. While both SME and the Commissioners attempt to defend the District Court's conclusion on the basis of the special use exception in the A-2 District for "Commercial Wind Farms/Electrical Generation Facilities," their reliance is fatally undermined by this unambiguous limitation set forth in the Cascade County Zoning Regulations. Their reliance on the special use provisions of the A-2 District suffer from other defects as well.

In their opening brief (at pp. 13-20), Plains Grains fully explicated the error of

the District Court's reliance on the "Commercial Wind Farms/Electrical Generation Facilities" provision, pointing out that there is a fundamental distinction between a proceeding for a special use permit before the Board of Adjustment and a rezoning proceeding before the County Commissioners. Indeed, in submitting the "Application for Rezoning," the Urquharts and SME acknowledged that, "The requested rezoning to Heavy Industrial use is a prerequisite to the planned construction and operation of an electrical generation station, known as the Highwood Generating Station . . ." (Tab C, p.1.) Simply stated, this case should have been treated below as the rezoning case that it is. Had SME and the Urquharts instead proceeded with an application for a special use permit, then entirely different procedures and standards would have applied to that hypothetical application.[9] In the

[9]The Cascade County Zoning Regulations state in relevant part that, "Special exception uses may be permitted in a zoning classification district if special provision for such special exception is explicitly listed in the Zoning District Regulations as a special exception and a special permit is issued." (CCZR § 2.99.180; Tab I.) Consideration of a "special permit" must adhere to CCZR § 8, wherein "each specific use shall be considered as an individual case" and such permit "may be issued only upon meeting all requirements in these regulations for a specific use which is explicitly mentioned as one of the 'Uses Permitted Upon Issuance of a Special Use Permit as Provided in § 8 . . ." (CCZR § 8.1; Tab I.) The CCZR require the Board of Adjustment, not the County Commissioners, to review a special use permit application, (see CCZR § 8.8; Tab I), and then, the Board of Adjustment can only approve a special use permit request upon first reaching a number of conclusions, including, "The proposed development will be in harmony with the area in which it is located." (CCZR § 8.5.4; Tab I.)

adjudicatory process before the Board of Adjustments, Plains Grains would have had the opportunity to point out that the "special exception" relied on was not, as required, "explicitly listed" in the regulations (CCZR § 2.99.180; Tab I), and that the proposed use in the A-2 District did not meet all requirements of the regulations; *i.e.*, the industrial use proposed through a special use proceeding can be granted "only in the I-1 or I-2 zoning classifications." (CCZR § 2.99.31; Tab I.)

In addition, as used in CCZR § 7.2.3.16, the term "Electrical Generation Facilities" depends upon such facility being attendant to a "Commercial Wind Farm." The District Court erroneously interpreted the slash ("/") between "Commercial Wind Farm" and "Electrical Generation Facilities" as an "and" or an "or." Clearly, the drafters of the special use regulations understood the difference between the "/" and the conjunction "or." (*Cf.* "Mobile Home Park **or** Recreational Vehicle Park," CCZR § 7.2.3.15; Tab I.) At best, the disputed special use provision is ambiguous and the Cascade County Zoning Regulations themselves state that, "Special exception uses may be permitted in a zoning classification district <u>if</u> special provision for such special exception <u>is explicitly listed</u> in the Zoning District Regulations as a special exception and a special permit is issued." (CCZR § 2.99.180; Tab I.)

The construction of the regulation urged by Plains Grains is further supported by the Montana Supreme Court's determination that legislation which promotes the

public health, safety and welfare[10] (and hence implementing regulations) must be liberally construed to achieve these objectives, and any exception is to be given a narrow interpretation. *State ex rel. Florence-Carlton School Dist. v. Board of County Comm'rs of Ravalli County* (1978), 180 Mont. 285, 291, 590 P.2d 602, 605.

SME argues that "the A-2 classification also permits 'utilities both major and minor,' which Plains Grains fails to acknowledge in its brief." (SME's Brief at p. 36.) SME's argument provides insight into its misunderstanding of the applicable regulations. First, while such a "special exception use" may be applied for to the Board of Adjustment for adjudication under the regulations governing the A-2 District, the regulations also define those terms and make clear that the term "utility installation, major" specifies "electrical substations" (not electrical generating stations), and the term "utility installation, minor" is defined to include "public water systems wells, sewer lift stations, irrigation ditches, and the like." (CCZR §§ 2.99.223 and .224; Tab I, attached.) Of course, the reason that zoning regulations include an extensive definition section is that the definitions inform the user's understanding of terms used in the text of the zoning regulations. This brings us once again to the Cascade County Zoning Regulations definition of "Industrial Uses" as,

---

[10]The explicit purpose of county zoning is "promoting the public health, safety, morals and general welfare." § 76-2-201(1), MCA.

"Uses of land which are allowed by right **or through the special permit process only in the I-1 or I-2 zoning classifications**, as listed in these regulations." (CCZR § 2.99.31; Tab I.) Thus, even under a special use permit process, an "Industrial Use" can only occur in an I-1 or I-2 zoning classification.

In sum, the District Court's conclusion that the HGS "Industrial Use" was "already permissible" in the A-2 Agricultural District by virtue of the special exception provision for "Commercial Wind Farms/Electrical Generation Facilities" was in error.

2. The zone change constitutes illegal spot zoning.

Although the Commissioners and SME acknowledge the applicability of the three *Little* factors, they attempt to avoid the conclusion of spot zoning by advancing misplaced legal arguments and misapprehending the facts.

a. Adjoining land use.

The first *Little* factor is whether "the requested use is significantly different from the prevailing use in the area." *Little*, 193 Mont. at 346, 631 P.2d at 1289. According to the Application for Rezoning:

> The area surrounding the Real Property consists of gently rolling rangeland with prominent drainage channels leading generally north to the Missouri River. The predominant land use is grain farming and cattle ranching, on a large-scale, commercial basis as opposed to hobby use.

(Tab C, p. 3.) The Staff Report prepared for the Commissioners confirms that the "Existing Land Use" is "Agricultural Production" in virtually every direction. (Tab E, p. 5.) The record further reveals that, "Agriculture and grasslands are not just the prevailing use; it is the **only** use in 36 square mile township where the property is located. . . Home sites in the area are associated with the agricultural uses." (Tab F(27), p. 57.)

Not surprisingly, the District Court itself determined that, "Unquestionably, there is a change of use," but, as described above, erroneously concluded that the coal-fired power plant was an "already permissible" use in the agricultural area prior to the rezoning request. (Order at p. 24; Tab A.) While both the Commissioners and SME now attempt to defend the Court's conclusion, Plains Grains has set forth above a compelling explication of the District Court's error in concluding that the coal-fired power plant "was already permissible."

In sum, the test established by the Supreme Court is whether "the requested use is significantly different from the prevailing use in the area." *Little*, 631 P.2d at 1289. Here, the prevailing use is agriculture. The industrial power complex is unarguably "significantly different" from the prevailing use.

b. Size of the area.

In upholding a finding of spot zoning in *Greater Yellowstone Coalition, Inc.*

v. Bd. of County Comm'rs of Gallatin County (GYC), 2001 MT 99, 305 Mont. 232, 25 P.3d 168, this Court explained:

> The second prong of the *Little* test for spot zoning focuses on the size of the area in which the requested use is to apply, but is not limited to the physical size of the parcel. It also includes analysis of how many separate landowners stand to benefit from the proposed zoning change. The District Court found that the Duck Creek parcel was small in relation to the Hebgen Lake Zoning District - the 323 acres at issue comprise a mere 2% of the District's 13,280 acres.

GYC, ¶ 26.

Here, while the District Court properly acknowledged this standard, it vitiated its application based on its misunderstanding of what uses were allowed in the A-2 District:

> On the surface, Plaintiffs appear to have a compelling argument. The proposed rezone area would comprise 'less than .05% of the total Zoning District area, Writ, p. 31, ¶ 75, and it looks to benefit only one landowner which is now SME. *See Greater Yellowstone Coalition v. Bd. of Commiss. of Gallatin Co.*, 2001 MT 99, 305 Mont. 232, 25 P.3d 168. However, this zoning 'change' was not required for the intended uses. Agenda Action Report, p. 11. Consequently, no spot zoning occurred where such use was already allowed by existing zoning regulations. *Id.*

(Order at p. 25; Tab A.)

Again, when properly considered, with the understanding that "such use" was not "already allowed by existing zoning regulations," then Plains Grains does indeed "have a compelling argument" and the second prong of the spot zoning test is clearly

met. As in *GYC*, the requested zone change is unarguably small in relation to the zoning district, constituting only .05% of the A-2 zoning district.

c. Special legislation.

In *Little*, this Court explained the fundamental distortion of the legislative process that occurs when a specific tract of land receives special zoning consideration for a particular owner:

> The County dignifies form over substance by arguing that the county commissioners were engaged in the legislative process when acting on the Developers' request to zone Cameron Tract as commercial. The commissioners were not involved in adopting a general policy of zoning for the area. Rather, they were involved in selecting a specific tract of land for a special zoning consideration for a particular owner.

Little, 193 Mont. at 344, 631 P.2d at 1288. This concern with the distortion of the legislative process is reflected in the final prong of the *Little* spot zoning test:

> Third, the requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Id., 193 Mont. at 346, 631 P.2d at 1289.

The District Court ruled that, "this last aspect of the *Little* test indicates special legislation, thus spot zoning." (Order, p. 26; Tab A.) Once again, however, the District Court undid its determination on the erroneous basis that the proposed use was already allowed in the Agricultural District with a special use permit.

SME appeals from the Court's conclusion of "special legislation." Both the Commissioners and SME attempt to use *Boland v. City of Great Falls* (1986), 275 Mont. 128, 910 P.2d 890, to argue that the proper focus of the Court's analysis of the third prong should be on the benefit to the general community that would result from the proposed development of the property. (Commissioners' Brief at p. 22; SME's Brief at p. 37.) To the contrary, *Boland* unequivocally clarified that the "primary focus" of the second and third *Little* factors must be on "not the benefit resulting from the development of the Property, but rather the benefit to landowners as a result of the rezoning." *Id.*, 275 Mont. at 134, 910 P.2d at 894. In *Boland*, the Court noted that the nearby landowners in the residential district would be positively impacted by the proposed new higher density residential development on blighted land, on which basis the Court affirmed the determination that "the zoning change would benefit the adjacent property owners whose property values would tend to increase from the project development." *Id.*, 275 Mont. at 135, 910 P.2d at 894.

In contrast, in concluding here that the rezoning was indeed "special legislation," the District Court recognized that:

> A truly substantive argument of the Plaintiffs is that one landowner (be it viewed as either SME, the current deed holder, or the Urquharts, the applicants) will benefit at the expense of others. That expense is not merely the location of a power plant in the "Back 40" but the power lines, rail spurs, and other industrial detritus of a large, power generating

> facility. As noted at hearing, these accessory impacts will be imposed on some landowners by way of eminent domain. Writ, p. 12, ¶ 21. To that extent, this aspect of the *Little* test distinctly favors Plaintiffs' position.

(Order, p. 25; Tab A.)

SME attempts a further disingenuous use of *Boland* by making it appear, through the use of an ellipses in a quote, that the *Boland* Court's discussion of general community benefits was in relationship to the third prong of the *Little* test. (See SME's Brief at p. 37.) Rather, the *Boland* Court had already concluded its spot zoning analysis, and turned its attention to the determination of whether the ordinance at issue "bears a reasonable relationship to the advancement of the public health, safety, morals or general welfare of the community." *Boland*, 275 Mont. at 135, 910 P.2d at 895.

Also relevant under the third prong of the *Little* test, some 200 acres of land rezoned to Heavy Industrial are within the boundaries of the Lewis and Clark Great Falls Portage National Historic Landmark. According to the National Park Service, "Such construction [of HGS] would result in delisting of most, if not all of the NHL." (Tab H, p. 2.) Thus, as in *GYC*, the significant negative impact to an important public

resource is one more indicia that the proposed rezoning is "special legislation."[11]

Finally, emblematic of the fact that the Commissioners enacted "special legislation" is the fact that the rezoning approved by the Commissioners is subject to eleven special conditions which apply **only** to SME. (Tab K, p. 3; Tab G(7), p. 1.)

In sum, as this Court explained in *Boland*, "since we held in *Little* that 'usually' all three elements are required to establish illegal spot zoning, it is possible that illegal spot zoning can occur in the absence of an element." *Boland,* 275 Mont. at 134, 910 P.2d at 894. Here, all three prongs of the spot zoning test are met. The District Court's conclusion to the contrary is predicated upon a mistake of law.

C. The Conditional Rezoning is Illegal.

In attempting to defeat Plains Grains' claim that the conditional rezoning is illegal, the Commissioners and SME cite to *Boland, supra*, and *Citizens Advocates for a Livable Missoula, Inc. v. City Council of Missoula*, 2006 MT 47, 331 Mont.

---

[11]A further indicia of "special legislation" is the failure of the requested use to be in accord with the comprehensive land use plan for the area. Here, emblematic of the substantial inconsistency of the rezoning with the "comprehensive land use plan for the area," *GYC* at ¶ 29, is the failure of the Commissioners to give any consideration whatsoever to the very "landscape unit" in the Cascade County Growth Policy that encompasses the subject property. (See Growth Policy at pp. 52-54, discussing the "Benches and Dissected Benches" landscape unit; Tab U, attached.) Included among the policies that are to be considered in regards to this area is the following: "Since the existing land use of the benches and dissected benches landscape unit is predominately agriculture, special consideration should be given to protect this use." (*Id.*, p. 54.)

269, 130 P.3d 1259. The legality of conditional zoning was not at issue in either case, and to date the Montana Supreme Court has not addressed this issue. The problems with the conditional zoning at issue in this case are briefly summarized as follows:

- § 76-2-205(5), MCA, requires that all regulations must be uniform throughout a district. When allowed, conditional zoning must be based on specific regulations and apply uniform standards. "Zone changes may be conditionally granted only when regulations authorize conditions to be imposed in specific circumstances, and when the regulations are uniformly applied." *Kaufman v. Zoning Comm'n of City of Danbury* (Conn. 1995), 653 A.2d 798, 812 (citations omitted).

- This Court has stricken under the "void for vagueness" doctrine zoning regulations which fail to give fair notice of the substance of the regulation. *Yurczyk v. Yellowstone County*, 2004 MT 3, ¶¶ 32-33, 319 Mont. 169, 83 P.3d 266. In *Yurczyk*, there was at least a written zoning regulation. Here, the "vague regulation" is even more amorphous. There are no written zoning regulations which set forth procedures and standards governing conditional zoning in Cascade County. In contrast, where local governing bodies have implemented conditional zoning (*i.e.*, the City of Whitefish, see Tab F(27)), it has been accompanied by such regulations.

The case of *Chrismon v. Guilford County* (1988), 322 N.C. 611, 370 S.E.2d. 579, relied upon by SME, only serves to emphasize the fundamental flaw with the conditional zoning at issue. (SME's Brief at pp. 42-43.) In *Chrismon*, the zoning regulations explicitly provided for the creation of the conditional use zoning district at issue, and the conditional use permit issued thereunder. *Id.*, 370 S.E.2d. at 581-82.

In sum, as explained by the Connecticut Supreme Court, "zone changes may be conditionally granted only when regulations authorize conditions to be imposed in specific circumstances, and when the regulations are uniformly applied." *Kaufman, supra.* The conditional zoning in this case is illegal and void.

D. The Commissioners Violated the Public's Right to Participate.

In addressing whether the public's right to participate in the decision-making process has been violated, the Commissioners argue that:

> Unlike *Bryan*, the Commissioners clearly did not have these documents in their possession during the process and did not deny the existence of something they did not even know about. Plains Grains also ignores the fact that during SME's presentation to the Commissioners, which occurred prior to opening the hearing for general public comments, SME explained each page of the information contained in the binder during a rather lengthy Powerpoint presentation.

(Commissioners' Brief at p. 37.)[12]

The attempt to distinguish *Bryan* only serves to heighten its applicability here. The *Bryan* Court's rationale as to why it was compelled to reject the government entity's argument that simply providing citizens with the opportunity to speak fulfilled the constitutional and statutory mandate of public participation is instructive:

> Such a superficial interpretation of the right to participate to simply require an uninformed opportunity to speak would essentially relegate

---

[12]As regards the public participation issue, SME adopts the arguments advanced by the Commissioners. (SME's Brief at p. 46.)

> the right of participation to paper tiger status in the face of stifled disclosure and incognizance.

Bryan v. Yellowstone County Elementary Sch. Dist. No. 2, 2002 MT 264, ¶ 43, 312 Mont. 257, 60 P.3d 381.

Here, not only did SME submit a three-inch binder of technical material in support of its request for conditional rezoning at the time of the January 15, 2008, public hearing, but the public hearing was closed at the conclusion of the hearing. (Transcript of January 15, 2008 public hearing at p. 360; Tab G(10).) Thus, as in *Bryan*, Plains Grains never had the opportunity to review, rebut or respond to either SME's proposed conditional rezoning, or the extensive technical materials submitted in support of the conditional rezoning. (Second Affidavit of Anne Hedges at ¶¶ 11, 13; Tab G.)

The Commissioners make the additional argument that:

> The fact that parties on *both* sides of an issue submitted additional comments and information at the final public hearing does not render that hearing a violation of the public's right to know or participate in the *legislative* process of considering a rezoning.

(Commissioners' Brief at p. 41.) The Commissioners fail to apprehend the important distinction between the role of the Board of Commissioners as decision-makers, and the constitutional and statutory rights of the public to participate in the decision-making process. In its recent decision in *Citizens for Responsible Development v. Bd.*

of County Commr's of Sanders County, 2009 MT 182, 351 Mont. 40, 208 P.3d 876, this Court made clear that simply providing the information to the Board of Commissioners, without the public having had the information provided to it in a reasonable fashion, ignores the very purpose of public participation:

> Failure to provide this information, or failure to provide it in a reasonably cohesive fashion, makes it difficult for the public to use the information. The Board argues that the crucial point is whether the Board had sufficient information before it. However, focusing on that point alone ignores the public participation purposes served by compliance with the statutory process.

Id., ¶ 24.

In sum, the "reasonable opportunity" to participate requires that the public be both fairly apprised concerning the proposal on which the governing body is to make a decision, and has available to it prior to the public hearing all documents that are material to the governing body's decision. *Bryan; Citizens; supra.* Here, that was not the case. The Commissioners' rezoning decision should have been set aside by the District Court pursuant to the provisions of § 2-3-114, MCA.

III. CONCLUSION

Plains Grains requests that the Court reverse the District Court and declare unlawful the rezoning from Agricultural to Heavy Industrial, and to further declare

that the zoning is therefore void and of no effect.

Respectfully submitted this 28th day of September, 2009.

Roger M. Sullivan
McGarvey, Heberling, Sullivan & McGarvey, PC
745 South Main
Kalispell MT 59901

Elizabeth A. Best
Best Law Offices, P.C.
425 3rd Avenue North
P O Box 2114
Great Falls MT 59403

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, and by Order of the Court dated September 25, 2009, I certify that the foregoing combined brief is produced in proportional font (Times New Roman) of not less than 14 point type, utilizes double line spacing, except in footnotes, headings and extended quotations, which are single spaced, and the word count calculated by WordPerfect 12 for Windows does not exceed 10,000 words, excluding certificate of service and certificate of compliance.

Dated this 28th day of September, 2009.

Roger M. Sullivan
McGarvey, Heberling, Sullivan & McGarvey, PC
745 South Main
Kalispell MT 59901

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2009, a true and correct copy of the foregoing document has been served via U.S. First Class Mail upon the following:

Alan F. McCormick
Garlington, Lohn & Robinson, PLLP
199 West Pine
P O Box 7909
Missoula MT 59807-7909

Brian Hopkins
Cascade Deputy County Attorney
121 - 4th Street North
Great Falls MT 59401

Gary M. Zadick
Mary K. Jaraczeski
Ugrin, Alexander, Zadick & Higgins, PC
#2 Railroad Square, Suite B
P O Box 1746
Great Falls MT 59403-1746

Linda M. Ranes

Linda M. Ranes

SUPPLEMENTAL APPENDIX

(Attached to Appellants' Combined Brief)

TAB G Second Affidavit of Anne Hedges filed 09/26/09

G(21) Option to Purchase Agreements dated 08/22/04 and 10/16/04; RUS letter dated 02/19/08 (*Exh. 21 to 2nd Aff. of Anne Hedges filed 09/26/08*)

G(22) Yellowstone Valley Electric Cooperative, Inc. letter dated 04/24/08 (*Exh. 22 to 2nd Aff. of Anne Hedges filed 09/26/08*)

G(23) 6/08 letter Re: Electric City Power Board's reevaluation of its participation in SME (*Exh. 23 to 2nd Aff. Of Anne Hedges filed 09/26/08*)

TAB I Additional referenced sections of Cascade County Zoning Regulations

TAB Q DEQ Violation Letter #VLRAG08-18 to SME dated 11/20/08

TAB R DEQ Revocation Letter to SME dated 08/03/09

TAB S DEQ Final Revocation of Air Quality Permit #3423-01 dated 08/20/09

TAB T Portions of SME Air Quality Permit Application dated 04/24/09

TAB U Referenced portions of Cascade County Growth Policy